In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-194

LANDIS TOOL COMPANY, DIVISION OF LITTON INDUSTRIES, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2-8) is reported at 460 F.2d 23. The Board's decision and order (Pet. App. 9-45) are reported at 190 NLRB No. 140.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1972 (Pet. App. 1). The petition for a

writ of certiorari was filed on August 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Company interfered with its employees' right to organize, in violation of Section 8(a)(1) of the National Labor Relations Act, by implicitly promising, during a union campaign, that the Company would remedy employee grievances if the Union lost the scheduled election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 48.

STATEMENT

In early 1970, the Union[1] began organizing employees at the petitioner Company's plant in Waynesboro, Pennsylvania (A. 91-92, 64-65, 100).[2] During the election campaign which followed, Company president Ralph Price conducted three special meetings for employees (A. 13, 14, 116, 117). At one of these meetings, Price began by telling the employees that

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[1] International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 110.

[2] "A." references are to the Appendix filed in the court of appeals.

he wanted to have a question and answer session in order to give the employees an opportunity to state their problems, gripes, and complaints (A. 13, 110, 115, 125, 131, 140-142, 144). He expressed interest in hearing problems "that can't be settled through your foreman or your supervisors * * *" (A. 140). Price added that he could not make any promises (A. 13, 15, 140, 141, 116, 131), but that he would check into the employees' problems (A. 140). After the employees voiced their complaints, Price responded that, in view of the election campaign, "there wasn't much he could do at the moment, under the circumstances, but he would do what he could"; "his hands was [sic] still tied—until after the election was over" (A. 125, 131). He advised the employees that he did not think they needed a union to straighten out their problems and that everything could be worked out between management and the employees (A. 13, 15, 125, 131, 143, 140-141).[3]

On the above facts, the Board, adopting the findings of the Trial Examiner, held (Pet. App. 9-10, 15-17) that, in order to undermine the Union's campaign, the Company had solicited employees' grievances and by clear implication had promised to correct them, thereby restraining the employees in the exercise of their organizational rights in violation of Section 8(a)(1) of the National Labor

[3] Price immediately proceeded to deal with a complaint that there was a shortage of cutting torches in the welding department on the night shift. When the employee who complained came to work the following night, he found a cutting torch on his bench (A. 15 n. 4, 119).

Relations Act, 29 U.S.C. 158(a)(1).[4] The Board ordered the Company to cease and desist from the unlawful conduct and to post appropriate notices; the contested election was set aside and a new one was ordered (Pet. App. 10, 43-45).

The court of appeals enforced the Board's order. It held that there was substantial evidence in the record to support the finding by the Examiner and the Board that implied promises were made to the employees that "their grievances would be remedied if the Union was defeated" (Pet. App. 3-5). This finding, the court noted (Pet. App. 5), "does not depend upon the operation of a per se rule"; it specifically rejected the application of "a per se rule that any solicitation of grievances in a preelection context will always be held to imply unlawful promises" (*ibid.*).

ARGUMENT

Although petitioner has attempted to formulate the issue somewhat differently in this Court, the essential question presented in this case is, as petitioner stated in his brief on appeal, "[w]hether there is substantial evidence on the record as a whole to support the conclusion the Company, by its President, Ralph Price, violated Section 8(a)(1) of the Act by

[4] The Board also found that the Company had violated Section 8(a)(1) by coercive interrogation, threats of job loss, and by suggestions that union activity was under surveillance (Pet. App. 19-24, 25-28). The court of appeals sustained these findings (Pet. App. 5-8), and the Company does not challenge them here.

conducting 'question and answer' sessions with employees during a union election campaign" (C.A. Br., p. 1). Despite the premise of the petition, the Examiner did not rely on a *per se* rule about preelection conversations between management and employees.[5] The Examiner, the Board, and the court below, all decided that on *this* record the Company's preelection conduct constituted the making of implied promises unfairly designed to undercut the organization campaign. Such an essentially factual determination does not warrant plenary review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

Unlike the cases that petitioner suggests are in conflict, the evidence here plainly shows that employees' grievances were solicited by the Company during the election campaign and that the employees were then repeatedly informed their grievances could be worked out with management without union intervention, that a union was "not need[ed] * * * to straighten out their problems" (Pet. App. 17).[6] The

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[5] In view of the court's holding that the Examiner's finding did not depend on the operation of a *per se* rule, the second question stated in the petition (Pet. 2)—whether appellate counsel can substitute his opinion for that of the Board by conceding that language "crucial to the holding of the case" is dictum only—is not presented on the record in this case.

[6] Reliance on *Fairchild Camera and Instrument Corporation* v. *National Labor Relations Board*, 404 F. 2d 581, 585 (C.A. 8), is misplaced. There, the court determined on the particular facts presented that the employer statements contained "no promises, no threats, and no coercion." Similarly, *National Labor Relations Board* v. *M. H. Brown Company*, 441 F. 2d

remarks in this case had the effect of undermining the Union's campaign efforts by implying that the Company would itself remedy the grievances. Promises of this sort during election campaigns are forbidden by Section 8(a)(1).[7] The promises are no more permissible because made by clear implication rather than expressly. As the court of appeals stated (Pet. App. 4-5):

> The conclusion that implied promises were made in a preelection context is supported by substantial evidence. The testimony suggests that the employees understood their grievances would be remedied if the Union was defeated. Such conduct was an interference with rights of employees guaranteed by Section 7 of the Act, 29 U.S.C. § 157, and [the Company] thereby violated Section 8(a)(1) * * *.

839, 842-843 (C.A. 2), is inapposite. The alleged "promise" of higher wages in that case, it turned out, had been decided upon by the employer before the union began its election campaign, and had been based on valid busines reasons.

[7] Section 8(c) of the Act, relied on by the Company (Pet. 9), precludes reliance on the expression of views, arguments, or opinions in finding unfair labor practices only when they do not contain a "promise of benefit" or "threat of reprisal." Because of the determination that promises of benefit were involved, Section 8(c) is inapplicable to this case.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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